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IN THE

Supreme Court of the United States

October Term, 1979

No. 78-1588

CAROL VANCE, *et al.*,

Appellants,

v.

UNIVERSAL AMUSEMENT CO., INC., *et al.*,

Appellees.

GEORGE E. McCREA, *et al.*,

Appellants,

v.

KING ARTS THEATRE, INC.,

Appellee.

BRIEF OF AMERICAN BOOKSELLERS ASSOCIATION, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., NATIONAL ASSOCIATION OF COLLEGE STORES, INC. AND THE FREEDOM TO READ FOUNDATION, AS *AMICI CURIAE*, IN SUPPORT OF APPELLEES

MICHAEL A. BAMBERGER
Attorney for Amici
Finley, Kumble, Wagner,
Heine & Underberg
425 Park Avenue
New York, New York 10022

TABLE OF CONTENTS

	PAGE
Statement	1
The *Amici*	2
Interest of the *Amici*	3
ARGUMENT	5
I. An injunction against the sale or exhibition of materials not previously found obscene by a court is a prior restraint in violation of the First and Fourteenth Amendments to the U.S. Constitution	6
II. An order closing a premises disseminating presumptively First Amendment-protected material is a prior restraint in violation of the First and Fourteenth Amendments to the U.S. Constitution	10
CONCLUSION	13

TABLE OF AUTHORITIES

CASES:	PAGE
Art Theater Guild, Inc. v. *Ewing,* 421 U.S. 923 (1975)	12
Bantäm Books, Inc. v. *Sullivan,* 372 U.S. 58 (1963)	6, 11
Gulf States Theatres of Louisiana v. *Richardson,* 287 So. 2d 480 (La. 1973)	13
McKinney v. *Alabama,* 424 U.S. 669 (1976)	9
Near v. *Minnesota,* 287 U.S. 697 (1931)	6, 11
New York Times Co. v. *Sullivan,* 376 U.S. 254 (1964)	11
New York Times Co. v. *U.S.,* 403 U.S. 713 (1971)	6, 7
Organization for a Better Austin v. *Keefe,* 402 U.S. 415 (1971)	6, 7
People ex rel. Busch v. *Projections Room Theatre,* 550 P.2d 600 (Cal. 1976)	13

PAGE

Sanders v. *State*, 203 S.E. 2d 153 (Ga. 1974) 13

Southeastern Promotions Ltd. v. *Conrad*, 420 U.S. 546 (1975) 7, 9

Speiser v. *Randall*, 357 U.S. 513 (1958) 9

State of Ohio ex rel. Ewing v. *"Without a Stitch"*, 307 N.E. 2d 911 (Ohio 1974) 12

United Transp. Union v. *State Bar*, 401 U.S. 576 (1971) 7

Universal Amusement Co., Inc. v. *Vance*, 587 F.2d 159 (5th Cir. 1978) 4, 10, 11, 12

STATUTES:

Article 4666, Texas Rev. Civ. Stat. .....*passim*

Article 4667, Texas Rev. Civ. Stat. .....*passim*

OTHER AUTHORITIES:

Emerson, "The Doctrine of Prior Restraint", 20 Law and Contemporary Problems 648 (1955) 8

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Statement

The American Booksellers Association, Inc., the Association of American Publishers, Inc., the Council for Periodical Distributors Associations, the International Periodical Distributors Association, Inc., the National

Association of College Stores, Inc. and The Freedom to Read Foundation (collectively referred to as "Amici") submit this joint brief *amici curiae,* pursuant to Rule 42 of the Rules of the Supreme Court of the United States, in support of appellees. This joint brief is submitted upon the written consent of both appellants and appellees.[1]

The *Amici*

Amici's members publish, produce, distribute, sell and lend books, magazines and other printed materials of all types, including those which are scholarly, literary, scientific and entertaining.

The American Booksellers Association, Inc. (ABA) is a trade association organized under the laws of the State of New York. It is the major national association of booksellers in the United States. ABA has approximately 5,200 members consisting of private book stores, department book stores, university book stores and chain book stores.

The Association of American Publishers, Inc. (AAP) is a trade association organized under the laws of the State of New York. It is a major national association in the United States of publishers of general books, textbooks and educational materials. Its approximately three hundred and twenty-five members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish most of all general, educational and religious books and materials produced in the United States. These works are sold and distributed in all fifty states to schoools, universities and libraries and through thousands of bookstores, department stores, drug stores, newsstands and other outlets in towns, villages and cities.

[1]The originals of appellants' written consent by the Attorney General of Texas, and of appellees' consent by Frierson M. Graves, Jr. are being filed herewith.

The Council for Periodical Distributors Associations is an Illinois not-for-profit corporation. It is the national trade association for over four hundred fifty independent local wholesale distributors of magazines, comic books, paperback books and newspapers in every state of the United States.

The International Periodical Distributors Association, Inc. is a trade association organized under the laws of the State of New York. It is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to whosesalers throughout the United States for ultimate distribution to retailers and the public.

The National Association of College Stores, Inc. is a trade association composed of approximately 2,300 college stores located throughout the United States.

The Freedom to Read Foundation, a non-profit organization supported by voluntary donations, was established in 1969 by the American Library Association to promote and defend First Amendment rights, and to foster libraries as institutions wherein every citizen's First Amendment freedoms are fulfilled.

Interest of the *Amici*

The filing of this brief reflects *Amici's* continuing interest in the decisions of this Court involving the balancing of First Amendment rights and restrictions on obscene materials not protected by the First Amendment, which restrictions also affect First Amendment protected materials.

This case presents two questions which are of vital concern to *Amici*—whether an order closing a premises, thereby prohibiting the dissemination from that premises of all materials, including those protected by the First Amendment, based on a finding of previous dissemination of obscene materials, violates the First Amendment to the United States Constitution, and whether an injunction barring dissemination by defendants of obscene materials for one year, based on the same finding, violates the First Amendment. The Fifth Circuit, en banc, suggested that the closure was unconstitutional but found it unnecessary to so find; it held that the injunction violated the First Amendment. *Universal Amusement Co., Inc.* v. *Vance*, 587 F. 2d 159 (5th Cir. 1978).

Amici are concerned that the reversal of the decision of the court below, which accords with the decisions of most other courts in the United States on these questions, would be a radical departure from traditional First Amendment standards created by the Court. The existence of prior restraints in this sensitive area would impede the flow of First Amendment-protected material by reason of the fear of retailers that something they sold or exhibited might subsequently be found obscene.

The *Amici* further fear that if the decision of the Court of Appeals is reversed and the Texas statute upheld, such legislation would be enacted and actively enforced throughout the United States in an effort by over-zealous public officials to control perceived public "nuisances," greatly inhibiting the fundamental freedoms protected by the First Amendment.

For these reasons, *Amici* respectively submit this brief urging the Court to affirm the decision of the United States Court of Appeals for the Fifth Circuit.

ARGUMENT

Two questions were before the court below: constitutionality of Article 4666, Texas Rev. Civ. Stat., which permits the mandatory closing of premises in certain situations for one year, and constitutionality of Article 4667, Texas Rev. Civ. Stat., which permits the granting of injunctions to abate public nuisances, including situations in which the alleged nuisance is the "commercial manufacturing, commercial distribution, or commercial exhibition of obscene material."

It is not clear what issues are before the Court. Appellants, in both their jurisdictional statement (page 3) and their brief (page 3), emphatically state that the constitutionality of Article 4666 is not at issue in this appeal:

> *Article 4666, Vernons Texas Civil Statutes is not involved in the appeal by Appellants Vance and McCrae.* . . .[T]his provision was never applied by these Appellants, was not part of their appeal to the Court of Appeals and the ruling of the Court of Appeals (majority opinion)—that the closing provisions are unconstitutional as applied to motion picture houses or bookstores—is not questioned by these Appellants in this Court.

Neither the jurisdictional statement nor appellant's brief contains a list of questions presented. However, the brief of Charles H. Keating, Jr. as *amicus curiae* in support of appellants, includes as one of the questions presented for review (page 9) the constitutionality of Article 4666. His brief argues the question at length.

Because it is not clear whether the constitutionality of Article 4666 is under consideration by the Court, we will not limit our discussion to the constitutionality of Article 4667 but will also address the constitutionality of Article 4666.

I.

An injunction against the sale or exhibition of materials not previously found obscene by a court is a prior restraint in violation of the First and Fourteenth Amendments to the U.S. Constitution.

The ban on prior restraints is the cornerstone of the First Amendment to the U.S. Constitution. The importance of the ban on prior restraints was clearly stated in *Near* v. *Minnesota,* 283 U.S. 697, 713 (1931):

> [I]t has been generally, if not universally, considered that it is the chief purpose of the guaranty [of freedom of the press] to prevent previous restraints upon publication.

In *Near,* the Court discussed the historical basis for the fundamental principle barring prior restraints and indicated that the limitation "has been recognized only in exceptional cases" (283 U.S. at 716). These exceptions, generally dealing with national security and other emergency situations of similar import,[2] do not have relevance to this case. As put more recently by the Court in the "Pentagon Papers" decision:

> "Any system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 70 (1963); see also *Near* v. *Minnesota,* 283 U.S. 697 (1931). The government "thus carries a heavy burden of showing justification for the imposition of such a restraint." *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415 (1971).

New York Times Co. v. *United States,* 403 U.S. 713, 714 (1971) (per curium opinion).

[2] *Cf. New York Times Co.* v. *United States,* 403 U.S. 713 (1971).

As *Amici* will demonstrate, both Articles 4666 and 4667 are unconstitutional prior restraints on the dissemination of First Amendment-protected material.

Article 4667(a)(3) of Texas Rev. Civ. Stat. provides for the enjoining of the use of a premises for the "commercial manufacturing, commercial distribution or the commercial exhibition of obscene material." Even where, as is apparently the case in Texas, such an injunction defines the materials enjoined in terms of the present *Miller* test for obscenity, the injunctive relief includes the prohibition of manufacturing, distribution and exhibition of materials not yet found obscene by a court, placing the responsibility for evaluating the material and the risk of violating the injunction on the retailer or exhibitor.

The Court has repeatedly held that speech protected by the First Amendment cannot be enjoined. *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415 (1971); *United Transp. Union* v. *State Bar,* 401 U.S. 576 (1971). Speech is protected until it is found in court to be obscene, and therefore outside the scope of the First Amendment. There is a fine "line between legitimate and illegitimate speech." *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U.S. 546, 559 (1975). Although Article 4667 purports to enjoin only the publication, distribution, or exhibition of obscene materials, the effect is to place the burden of determining what is obscene on the bookseller or motion picture theater operator. Thus, self-censorship will curtail the availability of First Amendment-protected material to the general public.

Amici are publishers, distributors, lenders, and sellers of printed materials protected by the First Amendment. *Amici* wish to emphasize that the concern expressed by the

court below as to the dangers of self-censorship is a real and practical concern. Time after time *Amici* have experienced a direct impact when laws abridging the First Amendment are passed. Until such laws are enjoined, found unconstitutional or repealed, retailers and others face-to-face with the governmental enforcers of such laws have declined to deal in materials which, although not obscene, would cause them to run the risk of expensive litigation and public obloquy.

It might be contended that the burden placed on retailers and others by such an injunction is no different than the burden they already face in connection with potential criminal liability under the obscenity laws. This view ignores several significant and determinative differences.

Perhaps most important of these is that the procedure for trial and punishment upon conviction for contempt includes none of the safeguards available to defendants charged under the criminal law for alleged dissemination of obscene materials. The differences between the procedure at trial for contempt and the subsequent criminal trial for dissemination of obscene materials are as follows:

> The presumption of innocence, the heavier burden of proof borne by the government, the stricter rules of evidence, the stronger objection to vagueness, the immeasurably tighter and more technical procedure —all of these are not on the side of free expression when its fate is decided.

Emerson, "The Doctrine of Prior Restraint," 20 Law and Contemporary Problems 648, 657 (1955).

Of equal significance is the loss of the right to jury trial, particularly in light of the Court's emphasis on the

"community standards" test in deciding whether a publication is obscene. As Justice Brennan pointed out:

> The jury represents a cross-section of the community and has a special aptitude for reflecting the view of the average person. Jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community standards.

McKinney v. *Alabama*, 424 U.S. 669, 688 (1976) (concurring op.)

Finally, there is the perception of the party enjoined that he is under constant official scrutiny—that there is an injunction directed at him alone. The chilling effect created by this perception, coupled with the inherent difficulty under the *Miller* test of determining what is obscene, inevitably will result in the withdrawal from distribution of protected material. The chilling effect is heightened by the fact that, under Article 4667(b), this action can be brought and enforced by any private citizen, for whatever motive, unrestrained by the normal checks and balances of government. As the Court is well aware, numerous private groups believe to be obscene that which is believed to be non-obscene by the community as a whole. Such groups, under a statute such as this, may freely act as self-appointed public prosecutors. "Because the line between unconditionally guaranteed speech and speech that may be legitimately regulated is a close one, the 'separation of legitimate from illegitimate speech calls for . . . sensitive tools.' Speiser v. Randall, 357 U.S. at 525. . . ." *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 561 (1975). Articles 4666 and 4667 are not sensitive tools; rather, they are bludgeons.

II.

An order closing a premises disseminating presumptively First Amendment-protected material is a prior restraint in violation of the First and Fourteenth Amendments to the U.S. Constitution.

Article 4666 of the Texas Rev. Civ. Stat. provides that whenever a court finds that a nuisance exists, judgment shall be entered abating the same, enjoining the defendants from maintaining the same, and "ordering the said house be closed for one year from the date of judgment" unless defendants post a penal bond of from one to five thousand dollars. The bond is conditioned on the non-repetition of the acts constituting the nuisance during the one year period. If this condition is not met, the penal bond is forfeited.

Appellants purported to apply Article 4666 to bookstores and motion picture theaters. While the decision of the court below strongly suggests its view that Article 4666 is an unconstitutional prior restraint when applied to bookstores, motion picture theaters and other disseminators of First Amendment-protected material (587 F.2d at 165-166), the court, applying the rule that "federal courts should refrain from passing upon a constitutional question" if there is an alternative statutory construction which would uphold the state statute, found that Article 4666 was not intended to be applicable to obscenity/nuisance cases.[3]

Amici has no basis to support or contest that finding. (Apparently there is no relevant legislative history.) However, in view of the position taken by *Amicus* Keating (see page 5 above), we strongly point out that if Article 4666

[3] While six judges in the court below discussed as to the finding of unconstitutionality of Art. 4667, the result as to Article 4666 was unanimous (587 F.2d at 173).

were construed to include within the category of nuisance cases conduct based on the sale or distribution of obscene materials, such an application of Article 4666 would violate the First Amendment to the U.S. Constitution.

Article 4666 permits the state, on a finding of prior sales or exhibitions of obscene material, to close the store, theater or other premises involved for one year, unless certain conditions are met.

The closing of a bookstore or motion picture theater is clearly a prior restraint of the broadest and most absolute kind. Nothing can be sold or displayed on the premises; even material clearly innocuous and protected by the First Amendment is barred. As the court below stated:

> Read together, Articles 4666 and 4667 clearly create a prior restraint. The statutes allow the state to close, for one year, a theatre that has exhibited obscene films. Unless a bond from $1,000 to $5,000 is posted, the showing of any motion picture is punishable by contempt of court. Thus, future conduct that may fall within the purview of the first amendment is absolutely prohibited after a finding of unprotected present conduct. It was precisely this practice that was condemned by the Supreme Court in the landmark case of *Near* v. *Minnesota,* 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931). Moreover, although a theater operator may post the bond and show films, he forfeits that bond if one of the films he has selected is deemed obscene. This statutory scheme obviously encourages a theater operator to steer wide of the danger zone by avoiding borderline films that are nonetheless protected under the first amendment. The line between obscenity and protected speech is "dim and uncertain," *Bantam*

Books, Inc. v. *Sullivan*, supra 372 U.S. at 66, 83 S.Ct. 631, and difficulty in locating that line leads to self-censorship, a particularly subtle and most insidious form of the malady. *Cf. New York Times Co.* v. *Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (defamation). (587 F. 2d at 165-166).

Amicus Keating argues strenuously that the decision of the Ohio Supreme Court in *State of Ohio ex rel. Ewing* v. *"Without a Stitch,"* 307 N.E. 2d 911 (Ohio 1974), and the action of the Court dismissing for want of a substantial federal question an appeal from that decision (*sub nom. Art Theater Guild Inc.* v. *Ewing*, 421 U.S. 923 (1975)), are "squarely in point" on this issue. *Amici* believe that the decision of the Ohio Supreme Court is erroneous and does not correctly apply the precedents of the Court as to the protections of the First Amendment. Even so, under the Ohio court's decision, Article 4666 would be invalid. To sustain the constitutionality of the Ohio statute, the Ohio Supreme Court defined the nuisance in question as the showing or sale of material which had already been found by the court to be obscene. Thus the bond posted by the proprietor would be subject to forfeiture only if the proprietor again sold or exhibited the material already held obscene. This certainly is a far cry from the Texas statute, under which the bond posted in lieu of closure is subject to revocation if the "acts prohibited in this law shall . . . be done . . . in said house," *i.e.*, the sale or exhibition of any material which may at some future time be found obscene.

The facts of one of the cases before the Court in this consolidated appeal demonstrates the breadth of the "chilling effect" of the unconstitutional prior restraint. In *King Arts Theatre, Inc.* v. *McCrea*, the mere act of an informal

communication by the county attorney to the theatre's landlord informing the landlord that an injunctive action was about to be commenced resulted in the landlord attempting to terminate the theatre's lease. The possibility that material sold will, at some time after its sale, be held to be obscene requires that the bookseller, to save his bond, censor the materials he sells and refuse to sell anything he believes may at a later date be deemed to be non-protected.

Amici therefore submit that, as has been held in all the reported cases known to *Amici*,[4] the closure provisions embodied in Section 4666 are a prior restraint on freedom of speech and the press in violation of the First and Fourteenth Amendments to the U.S. Constitution.

CONCLUSION

In view of the foregoing, the *Amici* respectfully urge the Court to affirm the decision below.

Respectfully submitted,

MICHAEL A. BAMBERGER
Attorney for Amici
Finley, Kumble, Wagner,
Heine & Underberg
425 Park Avenue
New York, New York 10022

[4] See, *e.g.*, *Gulf States Theatres of Louisiana, Inc.* v. *Richardson*, 287 So. 2d 480 (La. 1973); *Sanders* v. *State*, 203 S.E. 2d 153 (Ga. 1974); *People ex rel. Busch* v. *Projection Room Theater*, 500 P.2d 600, 609-610 (Cal. 1976).